ORISSA HIGH COURT : CUTTACK

MISC. CASE NO. 31 OF 2010

(Arising out of COPET Nos.15 & 17 of 2006)

Indian Metals and Ferro Alloys Ltd. Petitioner
Having its registered office at
Bomikhal, P.O. Rasulgarh, Bhubaneswar,
Dist-Khurda

For Petitioner : M/s. S.S. Das, Miss. A. Dutta,
B.R. Das, K. Behera & S. Modi

Decided on 16 .03. 2011

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

O R D E R

M. M. DAS, J. This is a petition under section 392 of the Companies Act filed by Indian Metals and Ferro Alloys Limited ('IMFA') with a prayer to modify the scheme of arrangement and amalgamation by confirming the reduction of share capital of IMFA by cancellation of 3,49,466 equity shares of Rs.10/- each presently held by the erstwhile ICCL Shareholders Trust.

2. The aforesaid Scheme was sanctioned by this Court vide its Order dated 13.10.2006 under Sections 391 and 394 of the Companies Act. The said Scheme was, inter alia, for amalgamation of erstwhile Indian Charge Chrome Limited

('ICCL') into IMFA. After sanction of the Scheme ICCL amalgamated into IMFA and ICCL was dissolved without being wound up.

3. Clause 12.1 of the Scheme provided for issue and allotment of one equity share of face value of Rs.10/- each of IMFA credited as fully paid up equity shares, for every fourteen equity of shares of the face value of Rs.10/- each fully paid up held in ICCL (after derating of share capital of ICCL by 50%) in consideration of amalgamation of ICCL into IMFA. Thus, under the Scheme every shareholder of ICCL was entitled for allotment of one share of IMFA for every 14 equity shares of ICCL held by him/her/it. The aforesaid Clause 12.1 of the Scheme is reproduced below:

> "12.1 Upon this Scheme becoming effective, IMFA shall, without any further application or deed, issue and allot to every member of ICCL, holding fully paid up Equity Shares in ICCL and whose names appear in the register of members of ICCL on the Record Date, his/her heirs, executors, administrators or the successors-in-title, as the case may be, in respect of every Fourteen (14) equity shares of the face value of Rs.10 each fully paid-up held by him/her/it in ICCL, one (1) equity share of the face value of Rs.10 each of IMFA credited as fully paid-up equity shares."

4. Before the Scheme, IMFA was also a shareholder of ICCL holding 2,42,17,272 (Two Crores Forty Two Lakh Seventeen Thousand Two Hundred Seventy Two) equity shares

of Rs.10/- each constituting 41.67% of ICCL's issued, subscribed and paid up capital. Thus, in terms of Clause 12.1, IMFA was entitled for allotment of 864902 equity shares of IMFA. However, since a company cannot hold its own shares, 864902 equity shares being the entitlement of IMFA should have been cancelled resulting in reduction of share capital of IMFA/ICCL within the meaning of Sections 100 to 103 of the Act. However, in order to enrich the small shareholders of ICCL (i.e. the shareholders other than promoters, persons acting in concert with promoters, financial institutions, banks, foreign institutional investors and shareholders who are shareholders of IMFA before giving effect to the Scheme), it was provided under Clause 13 of the Scheme that the aforesaid 864902 equity shares, being the IMFA's entitlement, will be allotted to a trust for the sale of the said shares by the trust to small shareholders of ICCL at a discount of not less than 50% to the market price. As per clause 13.2 of the Scheme, offer was to be made by the trust to the small shareholders in one or more lots, preferably within a period of 18 months but in any case not later than period of 3 years. Aforesaid Clause 13 is reproduced below:

> "12.1 Allotment of Shares of Trust
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> 13.1 Shares of IMFA to be issued in accordance with this Scheme, in relation to the shares of ICCL held by IMFA shall, without any further application, act, instrument or deed be issued or

allotted directly to the Trustees (including the survivors or survivor of any of the trustees), who shall hold such shares in trust together with all additions or accretions thereto upon trust exclusively for the benefit of IMFA and its successor subject to the powers, provisions, discretions, rights and agreement contained in the instrument establishing the aforesaid trust. The constitution of the Trust, and the functions and powers of the Trustee shall be set forth in the Trust Deed. The obligations of the Trustee shall stand discharged and the Trust shall stand terminated in accordance with the provisions of the Trust Deed. The first Trustees of the Trust would be Shri G.L. Tandon, Padma Bhushan, Mr. Shailesh V. Haribhakti, Chartered Accountant and Shri D.P. Bagchi, I.A.S. (Former Chief Secretary, Government of Orissa).

13.2 The aforesaid shares which would constitute approximately 4% of the capital of IMFA, after giving effect to the Scheme, shall be made available by the trustees to the small shareholders of IMFA, as on the Record Date in one or more lots preferably within a period of Eighteen months but in any case not later than a period of three years, at a discount of not less than 50% to the market price prevailing at such time. For this purpose, small shareholders would mean shareholders other than promoters (including persons acting in concert), financial institutions, banks, foreign institutional investors, shareholders who are shareholders of IMFA before giving effect to the Scheme.

13.3 The proceeds on realization as aforesaid shall be utilized by IMFA for discharge of liabilities of Secured Lenders."

5. Accordingly, after sanction of the Scheme by this Court, a Trust was formed under the name and style of "Erstwhile ICCL Shareholders Trust" and a trust deed was executed in terms of Clause 13 of the Scheme. The Trust Deed,

inter alia, provided for cancellation of the shares not accepted by the small shareholders. The relevant Clause 7.2 of the Trust Deed is reproduced below:

> "7.2 **Termination of the Trust**
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> The Trust shall terminate upon the occurrence of either of the following events, whichever is earlier.
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> a) the expiry of the Term or the Varied Term; or
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> b) the Trustees selling the shares held in the Trust Fund in accordance with the provisions of this Trust Deed, making the payment of the Trust Fund to the Beneficiary and the Trustee having satisfied all obligations of the Trustees under this Trust Deed.
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> c) If by the expiry of the Term or Varied Term, the IMFA Trust Shares are not sold as aforesaid, the same shall be transferred to the Beneficiary on the date of the foregoing expiry resulting in cancellation of such shares."

6. As provided in Clause 13 of the Scheme, the IMFA's entitlement being 864902 equity shares of IMFA were allotted to the Trust. Similarly, as provided in Clause 13 of the Scheme and in the Trust Deed, the aforesaid 864902 equity shares of IMFA were offered by the Trustees to small shareholders of ICCL in proportions to their shareholding in ICCL as on the record date i.e. 27.11.2006 at the discounted rate of Rs.50/- per share as

against the market price of Rs.207.85 prevailing at that time vide offer letter dated 14.08.2009 to each small shareholder individually sent by UPC post. Under the said offer, the small shareholders were given time till 30.09.2009 to accept the offer.

7. The Trustees also authorized the Chief Financial Officer & Company Secretary of the Petitioner, inter-alia, to extend the time to accept the aforesaid offer. Accordingly, the aforesaid offer was extended three times-firstly till 31.10.2009, secondly till 31.12.2009 and lastly till 15.02.2010. The first two extensions were by way of notification on the petitioner's website and the third extension was by way of reminder letters dated 23.12.2009 sent individually by UPC post to those small shareholders individually who had not accepted the offer till then. The aforesaid third extension was notified on the Petitioner's website also.

8. Even after the third extension/reminder by the Trustees, the small shareholders of ICCL have accepted only 515436 equity shares out of total 864902 offered shares offered to them. Thus, despite the three extensions 349466 equity shares have not been accepted by the small shareholders of ICCL and these shares are presently standing in the name of the Trust in the records of IMFA.

9. Therefore, in terms of Clause 7.2(c) of the Trust Deed, the Trustees in their meeting held on 16.06.2010 have decided to cancel all the balance 349466 unaccepted equity shares.

10. The learned counsel for the petitioners submits that at the time of propounding the said Scheme, this situation that some of the small shareholders will not accept the shares offered to them at a discount of 50% was not conceived and, therefore, the Scheme does not provide for dealing with such unaccepted shares. She submits that the need for modification of the said Scheme arose during the implementation of the Scheme. She further submits that the cancellation of the said unaccepted shares will result in reduction of paid-up share capital of IMFA.

11. On 01.02.2011 this Court fixed the hearing of this petition on 08.03.2011 and also directed the Petitioner to advertise the notice of hearing in the English Daily “The New Indian Express” and the Oriya Daily “The Samaja” not less than 10 days before the date fixed for hearing. This Court also directed the petitioner to file the said publications in Court not less than 10 days before the date fixed for hearing.

12. In compliance to the said directions, the petitioner has filed a Memo dated 25.02.2011 stating therein that the

notice of hearing has been published in both the newspapers on 21.02.2011.

13. No objection to the petition has been filed by any person pursuant to the notice of hearing published in the newspapers. The learned counsel for the petitioner submits that since only the rights of the shareholders of IMFA and/or erstwhile ICCL are affected by the modification sought in this petition, no other person, in any event, has any right to object to the modification of the said Scheme. She further submits that since the consequent reduction of capital does not involve either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the interest of creditors of IMFA are not affected in any manner and hence they do not have any right to object to the modifications sought in this petition.

14. Under Section 392 of the Companies Act, the Court sanctioning a Scheme has the power to supervise the carrying out of the Scheme and may, at the time of sanction of the Scheme or at any time thereafter, give such directions in regard to any matter or make such modifications in the Scheme, as it may consider necessary for the proper working of the Scheme. The Hon'ble Supreme Court in the case of **S.K. Gupta and Another vs. K.P. Jain & Anr.** *{(1979) 49 Comp. Cases 342}*

while discussing the scope of power of the Company Court under Section 392 of the Companies Act held as under:

> "At the outset it may be mentioned that though a large number of provisions of the Companies Act, 1956, are in pari material with the provisions of the Companies Act, 1948, of the U.K. ("U.K. Act" for short), there is no provision analogous to Section 392 in the U.K. Act. The Court under the U.K. Act has no power to modify the scheme either at the time when it is offered for its sanction or at any time subsequent thereto. Parliament has, in its wisdom, conferred a power of wide amplitude on the High Court in India to provide for its continuous supervision of the carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing the hitches, obstacles or impediments in the working of compromise or arrangement by conferring power to give such directions in regard to any matter or for making such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise and/or arrangement." (Page 349-350)
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> When a scheme is being considered by the court, in all its ramifications, for according its sanction, it would not be possible to comprehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in s.392, the only obvious alternative would be to follow the cumbersome procedure as provided in s.391(1), viz., again by approaching the class of creditors or members to whom the compromise and/or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time consuming and,

> therefore, the legislature in its wisdom and, therefore, the legislature in its wisdom conferred power of widest amplitude on the High Court under Section 392 not only to give directions but to make such modification in the compromise and/or arrangement as the Court may consider necessary, the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose underlying Section 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the Court must exercise continuous supervision [see Section 392(1)], and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U.K. Act in which provision analogous to Section 392 is absent." (Page 351)

15. In this case, the modification is sought by the petitioner for cancellation of 3,49,466 equity shares of IMFA which have not been accepted by the small shareholders of erstwhile ICCL offered to them at a discount of 50% pursuant to the said Scheme. This situation was not conceived at the time of framing the said Scheme and, therefore, this situation has arisen during the working of the Scheme. No objection has been

received from any person to the modification sought in this petition. The shareholders to whom the said shares were to be offered under the Scheme have not accepted the same despite reminders as aforesaid. Further, since the consequent reduction of capital does not involve either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the interest of creditors of IMFA are not affected. The modification sought in this petition is merely a small portion of the Scheme and does not involve any substantial modification of the Scheme. Considering the circumstance leading to the modification sought and nature of such modification, I am of the view that the same does not affect the interest of any shareholder of either the erstwhile shareholder of ICCL or IMFA or creditor of IMFA adversely and there cannot be any possible objection to the same. As held by the Hon'ble Supreme Court in *S.K. Gupta case* (supra) the Company Court has been conferred power of widest amplitude under Section 392 not only to give direction but to make such modifications in the Scheme as the court may consider necessary and the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the Scheme.

16. For the above reasons, I am of the view that there is no impediment in allowing the modifications sought in the Scheme and I am inclined to allow the petition.

17. Accordingly, the petition is allowed and the Scheme sanctioned on 13.10.2006 is modified to the extent that 3,49,466 equity shares of Rs.10/- each of IMFA presently held by the erstwhile ICCL Shareholders Trust stand cancelled and the consequent reduction of share capital of IMFA to the above extent is confirmed and minute of reduction, annexed as Anneuxre-8 to the petition, is approved.

18. The Registry will issue certified copy of the approved minute of reduction and the certified copy of this order to the petitioner within 10 days and within 30 days thereafter, the petitioner shall file the certified copy of this order and the approved minute of reduction with the Registrar of Companies for registration. Notice of the said registration shall also be published by the petitioner in the English Daily “The New Indian Express” and the Oriya Daily “The Samaja”.

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M.M. Das, J.

Orissa High Court, Cuttack.
March 16th, 2011/ *Himansu*.